Reforming Investment Treaties: UNCTAD's 2015 World Investment Report

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On the 24th of June, the United Nations Conference on Trade and Development ('UNCTAD') launched its 2015 World Investment Report. The Report, titled "Reforming International Investment Governance", is the 25th in the yearly series from the UN body.

As for previous years, the 2015 Report provides a statistical summary of the prior year's foreign direct investment flows, an outline of trends in investment disputes, and an analysis of investment policy-making at the municipal, regional and international levels. As the title of the 2015 Report suggests, however, its key focus is upon options for reforming the system of international investment protection.

It is impossible in the space of this post to consider in any detail the full range of possible reforms outlined in the Report. Instead, this post highlights four prominent cross-cutting themes from the Report. To find out more about the report generally, readers may be interested in UNCTAD's summary of the key messages of the Report or this video from the launch of the report.

The Need for Reform

The Report identifies 2014 as a "period of reflection, review and revision" in investment treaty practice (p. 120). Whilst acknowledging that the number of investment treaties grew to 3,271 in 2014, the Report notes that the year also saw changes to the substance of such treaties as well as an "increasing number" of States "reviewing their model IIAs" (p. 108). In launching the Report, UNCTAD's Secretary-General Mukhisa Kituyi noted UNCTAD's view that:

> The case for reform is clear…'Old style' international investment agreements have increasingly come to a dead end. Reform should make the global network of international investment agreements better fit the needs and realities of today and tomorrow.

The Report attempts to cover, "in a single chapter, all the key aspects of IIA reform (i.e. substantive, procedural and systemic)" (p. 120). Specifically, the Report calls for future treaties to be formulated such that they will be capable of:

> safeguarding the right to regulate for pursuing sustainable development objectives, reforming investment dispute settlement, promoting and facilitating investment, ensuring responsible investment, and enhancing systemic consistency. (p. 120)

These calls for reform are not new for UNCTAD. Indeed, the Report builds upon previous reports (in particular, the 2012, 2013 and 2014 Reports), along with a range of other UNCTAD publications. What comes across very clearly in the 2015 Report, however, is UNCTAD's view of which principles ought to guide the future development of the international investment protection regime.

1. Treaty Reform as a Guiding Methodological Principle

First, the Report is heavily geared toward reform through comprehensive treaty renegotiation. The Report therefore does not engage with how current treaties are being interpreted and applied, or how such interpretations might be improved "from within". For a further discussion of the role that could be played by "system-internal" reform, readers may be interested in this recent article by Joshua Paine.

The specific treaty reforms envisaged by UNCTAD are identified as part of a "tool box" of reforms, which it encourages States to "pick and choose" from in negotiating or modifying their investment treaties (p. 171). The tools are as follows:

1. "adding new treaty provisions", in particular, to incorporate clauses to preserve the right to regulate or to promote responsible investor behaviour;

2. "omitting existing provisions" especially those "that have proven controversial";

3. "reformulating existing provisions" to "clarify or circumscribe the scope of provisions";

4. "carving out aspects" by, for example, "limiting the scope of protected investments" or "the situations to which ISDS applies";

5. "linking provisions" by, for example, making protection subject to a host State's level of development;

6. "calibrating provisions", including through the establishment of differentiated responsibilities for less developed treaty partners;

7. “creating mechanisms” such as appellate institutions or standing investment courts; and

8. “referring to other bodies of law”, such as rules on corporate social responsibility . (pp. 132-134)

UNCTAD urges for a “holistic” approach to be taken to such reform, cautioning that “selective adjustments cannot comprehensively address the challenges posed by the existing stock of treaties” (p. 130).

2. The Importance of Multilateralism

Second, the Report reveals UNCTAD’s clear preference for any reformed investment treaty regime to be more multilateral in nature. The Report observes that: “[o]nly a common approach can ensure that reform does not lead to further fragmentation and incoherence, but is for the benefit of all, without leaving anyone behind” (p. 120). This preference for multilateral reform is perhaps unsurprising given UNCTAD’s mandate.

UNCTAD endorses a move to “promote harmonization of investment rules” (p. 160). Specifically, it calls for the phasing out of bilateral treaties and their replacement with “megaregional treaties” such as the Transatlantic Trade and Investment Partnership (p. 161). The Report observes in this respect that:

> Eight megaregional agreements concluded or under negotiation in which BIT-type provisions are on the agenda overlap with 140 agreements… If the States that are parties to these forthcoming agreements opted to replace the pre-existing BITs between them, it would be a noticeable step towards streamlining the global IIA regime. (p. 162)

Beyond this function of regional harmonsation, the Report also envisages that such treaties will ultimately also produce model treaties that can “serve as the basis for future negotiations with third parties with the potential to result in treaties that will be similar to each other” (p. 162). This theme of multilateralism surfaces also in the Report’s discussion of institutional reforms. The Report suggests, for example, that the ability of investor-State dispute settlement institutions to foster “legal consistency and predictability…would be more pronounced in a pluri or multilateral context” (p. 150). The Report also cites multilateral instruments like the UN Transparency Convention as as offering further “opportunities” for reform with multilateral effects (p. 163).

3. Sustainable Development as a Guiding Substantive Principle

The discussion of reform in the Report starts from the proposition that the “conservation of natural resources, environmental protection and social well-being…have become universally recognized guiding principles for…investment policymaking” (p. 127). In light of this new “paradigm”, UNCTAD posits that sustainable development is (or should now be) “[t]he overarching objective of investment policymaking” (p. 129). The substantive reforms identified in the Report thus focus heavily upon making sure that investment treaties are “harmonized with, and made conducive to, the broader goal of sustainable development” (pp. 127, 129).

Despite the Report referring to the notion of "sustainable development" over 100 times, the precise means by which the system might be reformed to take it into account are somewhat of a moving target. Broadly speaking, the Report suggests that the principle of sustainable development will best be addressed by two types of reform, namely:

1. reform of treaties to "ensure that countries retain their right to regulate for pursuing public policy interests, including sustainable development objectives" (p. 128); and

2. inclusion of provisions in treaties to ensure "responsible investment" and "responsible investor behaviour" (p. 128, 157), including respect for human rights (p. 159).

This focus upon sustainable development coincides with the development of the the UN's "Sustainable Development Goals" ('SDGs'), and follows from UNCTAD's 2014 Report ("Investing in the SDGs: An Action Plan"). Much has been written about the relationship between sustainable development and investment protection, and a good entry point into the debates in this area is offered by this book by Segger, Gehring and Newcombe.

4. The Move towards Permanent Dispute Settlement Bodies

The Report also weighs in on the debate about the future design of investor-State dispute settlement institutions. In discussing reform options for investor-State arbitration, the Report expresses a view that permanent or standing institutions may be better able to deliver the identified goals of reform. Specifically, it envisages that permanent institutions may be more capable of "delivering consistent – and balanced – opinions, which would rectify some of the legitimacy concerns about the current ISDS regime" (p. 150).

UNCTAD does not clearly explain why a permanent institution might be better able than an *ad hoc* body to deliver "balanced" decisions. The position may well follow from the Report's earlier endorsement of "holistic" reforms, which would mean that the substantive provisions being applied by any permanent institution would already have undergone some form of "recalibration". Readers may be interested in this recent post by Simon Lester, however, which queries the basis of similar assumptions appearing to underpin some of the discussions about the creation of a standing investment court in the European Union.

The subject-matter of the 2015 Report gives it immediate relevance to contemporary discussions of the future of the international investment protection regime. Hopefully, the Report will provoke further discussion about the options that are available for any future reform of the system. In those discussions, care must, however, be taken to reflect upon the agendas, principles and assumptions which inform the structure and focus of any identified reforms.